Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN BENJAMIN WALLACE, JR.
Petitioner

v.

STATE OF ALASKA
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

WEIDNER & ASSOCIATES, INC.
Attorneys for Petitioner

By: Phillip Paul Weidner 9/27/99
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In the Supreme Court of the State of Alaska

John Benjamin Wallace, Jr.	)	Supreme Court No. **S-08084**
Petitioner,	)	
v.	)	
	)	**Order**
State of Alaska,	)	Petition for Hearing
Respondent.	)	Date of Order: **6/29/99**

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Carpeneti, Justices, and Compton, Senior Justice, Pro Tem* [Bryner, Justice not participating].

It is Ordered:

The Petition for Rehearing is **Denied**.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/

Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, Pro Tem, joins, dissenting. They would grant the petition.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Rowland
Trial Court Appeals Clerk - Anchorage

Distribution:

Phillip Paul Weidner
Weidner & Associates APC
330 L Street #200
Anchorage AK 99501

William H Hawley Jr.
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*Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Administrative Rule 23(a).

In the Supreme Court of the State of Alaska

John Benjamin Wallace, Jr.	)	Supreme Court No. **S-08084**
Petitioner,	)	
v.	)	**Corrected Order**
State of Alaska,	)	Petition for Hearing
Respondent.	)	Date of Order: **5/5/99**

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Carpeneti Justices, and Compton, Senior Justice, pro tem* [Bryner, Justice not participating].

It is Ordered:

The Petition for Hearing, filed on 4/16/97, and granted on 8/6/97, is **Dismissed** as improvidently granted.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/
Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, pro tem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be used. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

cc: Supreme Court Justices
Court of Appeals Judges
Judge Rowland
Trial Court Appeals Clerk - Anchorage

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*Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

In the Supreme Court of the State of Alaska

John Benjamin Wallace, Jr.	)	Supreme Court No. **S-08084**
Petitioner,	)	
v.	)	
	)	**Order**
State of Alaska,	)	Petition for Hearing
	)	
Respondent.	)	Date of Order: **5/4/99**
	)	

Trial Court Case # **3AN-93-07066CR**
Court of Appeals # **A-5964**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Bryner, Justices, and Compton, Senior Justice, pro tem* [Carpeneti, Justice, not participating].

It is Ordered:

The Petition for Hearing, filed on 4/16/97, and granted on 8/6/97, is **Dismissed** as improvidently granted.

Entered by direction of the court.

Clerk of the Appellate Courts

/s/

Marilyn May

MATTHEWS, Chief Justice, with whom COMPTON, Senior Justice, pro tem, joins, dissenting. Alaska Statute 26.05.070 limits the purposes for which the National Guard may be used. These limitations exclude the use of the National Guard for routine law enforcement. Because it appears to me that the limitations of this statute probably were exceeded in this case, and that the decision of the court of appeals is erroneous in this respect, I do not agree that the petition in this case should be dismissed.

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THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN BENJAMIN WALLACE, JR.,	)	Court of Appeals No. A-5964
Appellant,	)	Trial Court No. 3AN-S93-7066CR
vs.	)	
	)	O P I N I O N
STATE OF ALASKA,	)	
Appellee,	)	[No. 1514 – February 28, 1997]

Appeal from the Superior Court, Third Judicial District, Anchorage, Mark C. Rowland, Judge.

Appearances: Phillip Paul Weidner and Nicole D. Stucki, Weidner & Associates, Inc., Anchorage, for Appellant. W.H. Hawley, Prosecutions and Appeals, Anchorage, and Bruce M.. Botelho, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, Coats and Mannheimer, Judges.

COATS, Judge.

On June 16, 1993, Detective Ronald Robinson of the Anchorage Police Department (APD) received an anonymous telephone call informing him that there was a marijuana growing operation located at 14201 Specking Road, "possibly in the upstairs and basement areas." The caller told Robinson "you can smell the marijuana outside of the building and you can hear fans running inside the building." Robinson said the caller had a "female voice" and spoke in a lucid manner. Robinson did not know the basis of the call for information.

Robinson then telephoned a Chugach Electric Association (CEA) employee and requested information

concerning the electric usage at 14201 Specking Road. Robinson did not obtain a search warrant or a subpoena for this information. Robinson was informed that the dwelling at this address was a duplex and that John Benjamin Wallace, Jr. was being billed for power consumption at both apartments. Robinson was told that the average monthly consumption was 3092 kilowatt-hours (kwh) for one apartment and 2557 kwh for the other. Robinson stated he knew from prior investigations that the average CEA customer uses 700 kwh of power per month.

On June 17, 1993, Robinson drove to 14201 Specking Road, accompanied by APD Detective Patrick O'Brian. O'Brian stayed in the car while Robinson walked up the driveway of the residence. Robinson said that as he approached the residence he smelled the "fresh pungent odor of growing marijuana." He also heard fans running inside the residence. Robinson then passed through a gate, went up to the porch and rang the door bell. A man came to the door whom Robinson recognized from a drivers license photo as John Benjamin Wallace, Jr. Robinson asked Wallace if a

fictitious person lived there and Wallace said he did not. Robinson asked if the residence was a duplex and Wallace responded it was not. Robinson stated in his affidavit for a search warrant that the smell of marijuana was stronger at the open door than in the driveway. When Robinson returned to the police car, O'Brian said he could smell marijuana on Robinson's clothing.

On June 18, 1993, Robinson submitted an affidavit and applied for a search warrant based on the information above. The magistrate issued a search warrant for the residence located at 14201 Specking Road.

On the evening of June 18, 1993, Robinson, Accompanied by four other APD officers and two members of the Alaska National Guard, went to the Specking residence to serve the warrant. No one was home and the officers forced entry through the back door. A marijuana growing operation was discovered in the basement. The members of the National Guard assisted in the search of the

basement and in dismantling the growing operation. Robinson found photographs of what appeared to be a different marijuana grow set up in a similar manner to the Specking Road grow just discovered. Paperwork was found upstairs, including a lease of a warehouse at 6100 Cordova Street to "John Walsh . . . doing business as John Walsh & Associates," a power bill for the location, and a hand diagram of the warehouse indicating a "Lab 'A'" and "Lab 'B.'"

Robinson and four other APD officers went to the warehouse at 6100 Cordova Street. While standing in the dirt road leading to the parking lot of the warehouse, all five officers said they could smell the "fresh pungent odor of growing marijuana" and could hear what sounded like powerful fans inside the building. Based upon this information, on June 19, 1993, Robinson obtained a search warrant for the warehouse. Robinson, accompanied by four other APD officers and nine members of the National Guard,

went to 6100 Cordova Street to serve the second search warrant. The police forced entry after there was no response to their knocking. The police found John B. Wallace, Jr. and Don Beaujean harvesting marijuana from a marijuana growing operation. Members of the National Guard stood around the perimeter of the warehouse when the police entered. The Guardsmen entered the warehouse after it was secured, dismantled the growing operation, and transported the marijuana and equipment to storage.

On September 15, 1993, an information was filed charging Wallace with six counts of fourth-degree misconduct involving a controlled substance. Wallace filed several pretrial motions, including a motion to suppress the evidence seized at his residence and at the warehouse. On January 6, 1995, Judge Mark C. Rowland denied these motions.

On January 9, 1995, Wallace entered nolo contendere pleas on two of the counts; the other four counts were

dismissed. Wallace preserved the issues he has raised in this appeal under Cooksey v. State, 524 P.2d 1251 (Alaska 1974).

On appeal, Wallace first contends that the Anchorage Police Department's use of the National Guard soldiers to execute the search warrants violated the Posse Comitatus Act and that the appropriate remedy is exclusion of the evidence discovered in the searches.

18 U.S.C. § 1385 (1988) (amended 1994), known as the Posse Comitatus Act, states:

> Whoever, except in cases and under circumstances expressly authorized by the constitution of Act Congress, willfully uses any part of the Army or the Air Force as a possecomitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The critical inquiry which must be answered is whether or not the Alaska National Guard constitutes " any part of the Army or the Air Force." 10 U.S.C. § 3062 (c) (1) (1994) States:

> The Army consists of-
>
> the Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserve[.]

(Emphasis added.) Likewise, 10 U.S.C. § 8062 (d) (1) (1994) states:

> The Air Force consists of-
>
> The Regular Air Force, the Air National Guard of the United States, the Air National Guard while in the service of the United States, and the Air Force Reserve[.]

(Emphasis added.)[1] As stated above, when the Guardsman participated in the search of Wallace's home and the Cordova Street warehouse, they were acting as members of the Alaska National Guard and were not in the service of the United States (also known as being "federalized"). Therefore, the Guardsman were not "part of the Army of the Air Force." Under the plain language of the statute, the

participation of the National Guard soldiers in serving the search warrant did not violate the Posse Comitatus Act.

Both the Third Circuit and a federal district court in Oregon have concluded that use of National Guard soldiers to enforce state criminal drug laws does not violate the Posse Comitatus Act. In United States v. Bensish, 5 F.3d 20, 25-26 (3d Cir. 1993), the Pennsylvania State Police used a squad from the Pennsylvania Army National Guard to assist them in the surveillance and investigation of a marijuana growing operation. The court concluded that the Posse Comitatus Act was not violated, because the Guard unit was not in federal service. In United States v. Kylla, 809 F.Supp. 787 (D.Or. 1992), overruled on other grounds, 37 F.3d 526 (9th Cir. 1994), a member of the Oregon National Guard operated a thermal imaging device in investigating a drug operation. The court Ruled that the Posse Comitatus Act was not violated, noting that: "[t]he Supreme Court has recognized

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[1] Members of the Alaska National Guard can be members of

the dual nature of a National Guard and the fact that National Guardsmen only lose their status as a member of the state National Guard when they are 'drafted into federal service by the President.'" Id. At 793 (citing Perpich v. Department of Defense, 496 U.S. 334, 344 (1990)) .[2]

---

either the Army National Guard or the Air National Guard.

[2] Wallace focuses on the "military purpose" exception to the Posse Comitatus Act and argues that the use of the National Guard in the instant case does not fit within the exception. This argument is irrelevant. It is true that military personnel can search suspects and seize evidence, notwithstanding the language of the Posse Comitatus Act, if an independent military personnel can the Posse Comitatus Act, if an independent military purpose justifies the military involvement. uses on the "military purpose" exception to the Posse Comitatus Act and argues that the use of the National Guard in the instant case does not fit within the exception. This argument is irrelevant. It is true that military personnel can search suspects and seize evidence, notwithstanding the language of the Posse Comitatus Act, if an independent military personnel can the Posse Comitatus Act, if an independent military purpose justifies the military involvement. See Harker v. State, 663 P.2d 932 (Alaska 1983). Wallace correctly asserts that no independent

Both the plain language of the Posse Comitatus Act and case law interpreting the Act support the conclusion that the state's use of National Guard soldiers to execute the search warrants did not violate the Posse Comitatus Act. We accordingly conclude that Judge Rowland did not err in finding that the state did not violate the Posse Comitatus Act in this case.

Wallace next contends that state statutes did not authorize the use of National Guard soldiers to execute the search warrants. However, the Alaska Constitution provides that "[t]he governor is commander-in-chief of the armed forces of the State. He may call out these forces to execute the laws, suppress of prevent insurrection or lawless violence, or repel invasion." Alaska Const., art. 3, § 19. Therefore, under the constitutional language, the governor is

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purpose justified the use of the National Guard to search Wallace's house and the warehouse. Nevertheless, no violation of the Posse Comitatus Act occurred because the Guardsmen were not federalized when they acted.

authorized to use National Guard soldiers to execute the laws. The statutes regulating the National Guard are set out in Chapter 5 of Title 26 of the Alaska Statutes. The parties have not cited any provision in that chapter that would prohibit the use of National Guard soldiers in this case.

Wallace argues that "[t]here is no federal law authorizing the National Guard's activities in the instant case."

Wallace cites 10 U.S.C. § 375 (1994), which prohibits the "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law." However, as we have previously discussed, the members of the Army National Guard who participated in the two searches were not members of the "Army, Navy, Air Force, or Marine Corps" because they were under the command of the Alaska National Guard and were not "in the service of the United

States." Furthermore, 32 U.S.C. § 109 (1994) states that "[n]othing in this title limits the right of a state . . . to use its National Guard . . . within its borders in time of peace." Also, 32 U.S.C. § 112 (d) (1994) states:

> Nothing in this section shall be construed as a limitation on the authority of a unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned.

Because federal law does not prohibit the use of the Alaska National Guard, and because the Guard was under the control of the State of Alaska's chain of command, the only restraint on the use of the Guard would be state law. As we have previously pointed out, state law does not appear to limit the governor's power to use the National Guard "to execute the laws."

Wallace next contends that the state did not show that the governor actually authorized the use of the National Guard soldiers to execute the search warrants in this case.

He contends that Judge Rowland improperly limited his ability to argue this issue by examining documents in camera and not turning them over to the defense.

In Braham v. State, 571 P .2d 631, 643 (Alaska 1977), cert. denied, 436 U.S. 910 (1978), the Supreme Court of Alaska stated the following concerning the duty of the prosecution to disclose confidential material to the defense:

> Non-disclosure was proper only if (1) the prosecution showed that discovery of the evidence would be inconsistent with protection of persons or enforcement of the laws and (2) the trial judge concluded that the material was not relevant to the defense. If the district attorney failed to show that disclosure would harm enforcement or protection efforts, the materials must be disclosed. The question of relevance would then be decided in an adversary context; both counsel would have the opportunity to make their respective arguments.
>
> Disclosure is also required if the judge's in camera inspection showed that the material was relevant to the defense-whether or not the prosecutor had demonstrated that discovery would be inconsistent with enforcement or protection efforts. In the

> latter circumstance, the state must decide between continuing to prosecute, while incurring the problems posed by disclosure, and terminating the prosecution in order to maintain the material's secrecy.

(Footnotes omitted.)

In the instant case Wallace requested disclosure of the Alaska National Guard Counterdrug plan. We have reviewed the materials which Judge Rowland reviewed in camera. We conclude that Judge Rowland did not err in refusing to require the prosecution to disclose to the defense the Alaska National Guard Counterdrug Plan. Judge Rowland could properly find that "discovery of the evidence would be inconsistent with protection of persons or enforcement of the laws" and "that the material was not relevant to the defense." The plan itself provides no insight into whether or not the governor of Alaska had authorized use of the National Guard for law enforcement purposes.

We believe that the record in this case sufficiently establishes that the use of National Guard soldiers to aid the police in executing the search warrant was properly

authorized. A letter in the record from the statewide narcotics unit chief written on behalf of the attorney general, certified that the unit chief had reviewed the National Guard Counterdrug Plan for the fiscal year ending September 30, 1993, and concluded that "all operations and activities for the federal funding under the plan are consistent with and not prohibited by state law." We do not believe that the state was required to show that the governor had specifically authorized the use of the National Guard in each individual case. We rely on State v. Wheelor, 903 P.2d 399 (Or. App. 1995). In that case the court stated:

> Defendants also argue that the execution of the warrant was unconstitutional, because the Guard participated in it without direct, formal, written authorization from the Governor. The state argues that the use of the Guard was properly authorized. The trial court found that, although the Governor had not authorized the use of the Guard in this particular case, she had ordered the Guard to cooperate with the Yamhill County Interagency Narcotics Team. The trial court further found that, in this case, the Guard participated under the direct supervision of

> the state police. Defendant does not challenge those findings. The question, therefore, is whether the governor's more general authorization suffices.

Id. At 405. Relying on the Oregon statutes, the court concluded that there was "no express requirement for the issuance of a formal, written order for each action the Guard is directed to take." Id. Similarly, was we have previously pointed out, the Alaska Constitution gives the governor broad authority to use the National Guard "to execute the laws." Alaska Const., art. 3, § 19. There is no requirement in the statutes regulating the National Guard (AS 26.05) which would require the governor to issue a formal written order for every individual action of the Guard.

Courts are entitled to rely on the presumption of regularity which attaches to the acts of public officials. The supreme court set out this presumption in Wright v. State, 501 P.2d 1360, 1372 (Alaska 1972), where the court quoted from Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960):

> Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.

This court and the supreme court have adhered to this principle in subsequent cases. See Tallman v. Dept. of Public Works, 506 P.2d 679, 681 (Alaska 1973) (where the losing party in a civil trial challenged the array of the jury panel, the supreme court stated, "[u]nless a challenging party makes some showing of a miscarriage of the official duty, we shall presume that duty has been regularly performed") (footnote omitted); Finkelstein v. Stout, 774 P.2d 786, 790 (Alaska 1989) (presumption of regularity was rebutted concerning the casting of absentee ballots); Jerrel v. State, 851 P.2d 1365, 1372 (Alaska App. 1993), cert. denied, 510 U.S. 1100 (1994) ("The presumption of regularity attaches to this situation, requiring this court to presume, in the absence of a contrary showing, that the trial court acted in accordance with its ruling[.]"); Houston-Hult v. State, 843 P.2d 1262,

1266-67 (Alaska App. 1992) (finding state established chain of evidence sufficiently, relying on presumption of regularity).

Employing the presumption of regularity, we conclude that Judge Rowland did not err in concluding that the use of the National Guard troops in this case was pursuant to lawful orders. We further conclude that Judge Rowland did not err in denying Wallace's motion to suppress on the ground that the use of these troops had not been properly authorized under state law.

Wallace next contends that there was in sufficient evidence to support the issuance of the warrants to search Wallace's house and warehouse. However, the information which the police presented to the magistrate in support of the warrant to search Wallace's house is very similar to the information which we recently found was sufficient in McClelland v. State, ___ P.2d___, Op. No. 1503 (Alaska App., Dec. 6, 1996). In McClelland, we followed "the vast

majority of cases [which] support the conclusion that either the smell of growing marijuana or the odor of burning marijuana will support the issuance of a search warrant." Id. At 5.

In the instant case, in his affidavit in support of the search warrant, Detective Robinson set out his extensive background in drug enforcement, including participation "in serving [thirty-two] search warrants involving indoor marijuana grow operations." He stated that "[b]ased on this experience I have come to be able to distinguish the fresh, pungent odor of growing or freshly harvested or processed marijuana." He then stated that he smelled the "fresh pungent odor of growing marijuana' as he approached Wallace's residence and the smell of marijuana was stronger at the open door of the residence. According to Detective Robinson, when he returned to the car after talking with Wallace, his partner, Detective Pat O'Brien, "who had not gotten out of the vehicle said he could smell marijuana o n

[Robinson's] clothing." From this testimony, the magistrate could properly determine that both officers were familiar with the odor of growing marijuana, could identify that odor, and smelled the odor coming from Wallace's residence. See McClelland at 6. Additionally, in his affidavit Robinson also supported his conclusion that Wallace had a marijuana growing operation at this house with evidence of Wallace's high electrical usage and the information from the anonymous telephone call. Although the anonymous tip and Wallace's electrical consumption are insufficient by themselves to establish probable cause, this information does corroborate the most significant information supporting the search warrant - the fact that the officers smelled growing marijuana at Wallace's residence. We conclude that the information which detective Robinson presented to the magistrate was sufficient for the magistrate to issue the search warrant. See McClelland, at 6-7.

Wallace next raises several arguments concerning the search of the warehouse. He first contends that the seizure of the documents and photographs at Wallace's house, which led the police to the warehouse, was not authorized by the warrant. Judge Rowland found that "the documents seized were within the ambit of the mandate contained in the warrant and related to legitimate purposes of the warrant in the Specking Street address." Judge Rowland's ruling is not clearly erroneous. The warrant authorized an extensive search for drugs and drug-related materials, and it appears that the photographs and documents which led the police to the warehouse were authorized by the warrant.

Wallace next contends that the search warrant for the warehouse was invalid because Robinson made misrepresentations in his affidavit in support of the search warrant. Robinson stated in his affidavit that paperwork found at Wallace's house "indicated" that Wallace leased and paid the electricity bills for the Cordova Street

warehouse. In fact, Wallace elicited from Robinson that none of the paperwork regarding the Cordova Street warehouse actually had Wallace's name on it. Robinson apparently concluded that Wallace was associated with the warehouse because the paperwork was found in the name of "J.B. Walsh" or "John Walsh," and Wallace's name is John B. Wallace, Jr. Robinson's affidavit could have led the magistrate to believe that Wallace's name was actually on the lease for the warehouse and its utility bills.

The Alaska Supreme Court in State v. Malkin, 722 P.2d 943 (Alaska 1986), held that misstatements in affidavits must be excised and the remainder of the affidavit tested for probable cause if (1) the defendant specifically points out the statements in the affidavit that are false, and (2) the state does not show by a preponderance of the evidence that the statements were not made intentionally or with reckless disregard for the truth. Id. At 946.

Robinson testified how he reached his conclusion that Wallace leased the warehouse and paid the utility bills. This testimony was sufficient for Judge Rowland to conclude that Robinson did not make intentional or reckless misstatements in order to obtain the search warrant. Also, Judge Rowland found that the search warrants were supported by sufficient evidence. Even if the information connecting Wallace with the warehouse was more specifically explained, the magistrate would have likely issued the warrant anyway. This is because the warrant was based almost entirely on the other information which the police found at the Specking Road house which led them to the warehouse, and upon the fact that the first officers smelled growing marijuana at the warehouse. Therefore, Judge Rowland did not err in failing to suppress the second search warrant based upon the statements Detective Robinson presented to the magistrate.

Wallace contends that the state presented insufficient evidence to the magistrate to support the issuance of the

second search warrant. However, as we indicated in our previous discussion, the materials which the police seized at Wallace's Specking Road house, coupled with their investigation of the warehouse (particularly the odor of marijuana emanating from the warehouse), supported the issuance of the search warrant.

Wallace next reasons that since the search warrants in question empowered "any peace officer" to serve the warrants, the search warrants did not authorize the police to allow the National Guard soldiers to assist them in serving the search warrant because the soldiers were not peace officers. When confronted with this argument, Judge Rowland pointed out that a police officer can call upon any citizen for assistance. Judge Rowland's observation is supported by AS 12.35.040, which provides that an officer executing a warrant has the power and authority "to call any other person to the officer's aid." We accordingly conclude that Judge Rowland did not err in rejecting this argument.

Wallace asserts that Detective Robinson violated his rights to privacy and freedom from unreasonable searches and seizures when he went through a gate in Wallace's fence, walked up the driveway to the front porch, and rang the doorbell. Wallace argues that this constituted a warrantless search of the curtilage surrounding his home and leading to the discovery of the odor of marijuana when Wallace opened his door. On this issue, Professor Wayne R. LaFave cites Lorenzana v. Superior Court, 511 P.2d 33 (Cal. 1973) for the principle that "[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there." 1 Wayne R. LaFave, Search and Seizure, § 2.3 (c) at 482-83 (3d ed. 1996). LaFave continues by citing other cases:

> [C]ourts have held "that police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public," and that in so doing they

> "are free to keep their eyes open and use their other senses." This means, therefore, that if police utilize "normal means of access to and egress from the house" for some legitimate purpose, such as to make inquiries of the occupant ...it is not a Fourth Amendment search for the police to see or hear or smell from that vantage point what is happening inside the dwelling.

Id. At 483-84 (footnotes omitted).

The Alaska Supreme Court has adopted this rationale. In Pistro v. State, 590 P .2d 884 (Alaska 1979), an Alaska State Trooper, with information that stolen truck parts may be in defendant Pistro's garage, drove in to his driveway. As he walked up to the side door of the garage to talk to two men he saw inside, he observed through the garage window an engine hanging on a block and tackle. Pistro was ultimately convicted of larceny and concealing stolen property. On appeal, Pistro argued that the trooper, by moving up the driveway, was trespassing and searching without a warrant. The court stated:

> Police officers walking through an unfenced driveway to inquire at premises have been held not to invade any reasonable expectation of privacy. The driveway was a normal means of ingress and egress impliedly open to public use by one desiring to speak to occupants of the garage, or to park off the street while visiting occupants of the house. This is not a case of an officer leaving such a means of public access to spy from an area not impliedly open to the public. There was no invasion of rights to privacy, and [the trooper] could constitutionally observe what was in plain view in the garage.

Pistro, 590 P.2d at 887 (footnote omitted).

According to Judge Rowland's findings, Detective Robinson, like the trooper in Pistro, approached Wallace's residence via the drive way, a normal means of ingress and egress. Accordingly, Judge Rowland did not err in rejecting Wallace's argument.

Wallace contends that Detective Robinson acted illegally and without a proper purpose, by approaching his residence and asking Wallace if a fictitious person lived

there. However, courts have routinely allowed police to employ non-coercive trickery in the course of investigations, and in serving search warrants. See State v. Weller, 884 P.2d 610, 612 (Wash. App. 1994) (detective knocked on defendant's door and pretended to be looking for table saw; court held the officer may lawfully enter porch and smell marijuana without violating the resident's right to privacy); United States v. Leung, 929 F. 2d 1204, 1208 (7th Cir.) cert. denied, 502 U.S. 906 (1991) (police investigating heroin sale properly used ruse which caused defendant to open door to hotel room); Lockwood v. State, 591 P.2d 969, 972 (Alaska 1979) (officers serving search warrant used ruse which caused defendant to open door; entry upheld because officers substantially complied with knock and announce requirements).

Detective Robinson was not required to be completely candid with Wallace by informing him that he was investigating whether Wallace was harboring a

marijuana growing operation. Under the law, the police have leeway to conceal the purpose of their investigation to avoid alerting suspects to the fact that they are being investigated. Requiring Detective Robinson to be more candid with Wallace might very well have alerted Wallace to the fact that he was being investigated, and resulted in the destruction of evidence. There is simply no such legal requirement.

Wallace next cites McGahan v. State, 807 P.2d 506, 509-11 (Alaska App. 1991), in which this court held that reasonable suspicion was required before the government could conduct a search with a trained dog to detect drugs. Wallace contends that we should impose a similar requirement on police officers, and require a police officer to have reasonable suspicion before he can approach a residence to detect drugs using his sense of smell. In discussing this issue, Professor LaFave states:

> [T]here is no "reasonable expectation of privacy" from lawfully positioned agents "with inquisitive nostrils." This means, for example, that no search in a Fourth

> Amendment sense has occurred when a law enforcement officer, lawfully present at a certain place, detects odors emanating from private premises, from a vehicle, or from some personal effects nearby.

1 LaFave, supra, at 403 (footnotes omitted). We agree with Professor LaFave's analysis and conclude that Judge Rowland did not err in denying Wallace's motion to suppress on this ground.

Wallace asserts that his rights of privacy and freedom from unreasonable search and seizure were violated by the police when they obtained his electrical usage records without a warrant. Wallace acknowledged that at the time he submitted his brief, Alaska courts had not yet ruled on this issue. Subsequently, this court addressed this issue in Samson v. State, 919 P.2d 171 (Alaska App. 1996). This court ruled that "utility records are maintained by the utility and do not constitute information in which society is prepared to recognize a reasonable expectation of privacy." Id. At 173. We adhere to our decision in Samson, and

conclude that Wallace had no reasonable expectation of privacy in his utility records.

The conviction is AFFIRMED.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Constitutional Provisions:

First Amendment, United States Constitution. Freedom of religion, of speech, and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Third Amendment, United States Constitution. Quartering of soldiers. No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment. Searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment. Rights of accused in criminal proceedings; due process; eminent domain. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 19, Alaska Constitution. Military Authority. The governor is commander-in-chief of the armed forces of the State. He may call out these forces to

execute the laws, suppress or prevent insurrection or lawless violence, or repel invasion. The governor, as provided by law, shall appoint all general and flag officers of the armed forces of the Sate, subject to confirmation by a majority of the members of the legislature in joint session. He shall appoint and commission all other officers.

FEDERAL STATUTES:

10 U.S.C. § 375. Restriction on direct participation by military personnel

The Secretary of Defense shall prescribe such regulations as may be necessary to ensure that any activity (including the provision of any equipment or facility or the assignment or detail of any personnel) under this chapter does not include or permit direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

18 U.S.C. § 1385. Use of Army and Air Force as posse comitatus

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

32 U.S.C. § 112. Drug interdiction and counter-drug activities

(a) Funding assistance.--The Secretary of Defense may provide funds to the Governor of a State who submits to the Secretary a State drug interdiction and counter-drug activities plan satisfying the requirements of subsection (c). Such funds shall be used for the following:

(1) The pay, allowances, clothing, subsistence, gratuities, travel, and related expenses, as authorized by State law, of personnel of the National Guard of that State used, while not in Federal service, for the purpose of drug interdiction and counter-drug activities.

(2) The operation and maintenance of the equipment and facilities of the National Guard of that State used for the purpose of drug interdiction and counter-drug activities.

(3) The procurement of services and equipment, and the leasing of equipment, for the National Guard of that State used for the purpose of drug interdiction and counter-drug activities. However, the use of such funds for the procurement of equipment may not exceed $5,000 per purchase order, unless approval for procurement of equipment in excess of that amount is granted in advance by the Secretary of Defense.

(b) Use of personnel performing full-time National Guard duty.--(1) Under regulations prescribed by the Secretary of Defense, personnel of the National Guard of a

State may, in accordance with the State drug interdiction and counter-drug activities plan referred to in subsection (c), be ordered to perform full-time National Guard duty under section 502(f) of this title for the purpose of carrying out drug interdiction and counter-drug activities.

(2)(A) A member of the National Guard serving on full-time National Guard duty under orders authorized under paragraph (1) shall participate in the training required under section 502(a) of this title in addition to the duty performed for the purpose authorized under that paragraph. The pay, allowances, and other benefits of the member while participating in the training shall be the same as those to which the member is entitled while performing duty for the purpose of carrying out drug interdiction and counter-drug activities. The member is not entitled to additional pay, allowances, or other benefits for participation in training required under section 502(a)(1) of this title.

(B) Appropriations available for the Department of Defense for drug interdiction and counter-drug activities may be used for paying costs associated with a member's participation in training described in subparagraph (A). The appropriation shall be reimbursed in full, out of appropriations available for paying those costs, for the amounts paid. Appropriations available for paying those costs shall be available for making the reimbursements.

(C) To ensure that the use of units and personnel of the National Guard of a State pursuant to a State drug

interdiction and counter-drug activities plan does not degrade the training and readiness of such units and personnel, the following requirements shall apply in determining the drug interdiction and counter-drug activities that units and personnel of the National Guard of a State may perform:

(i) The performance of the activities may not adversely affect the quality of that training or otherwise interfere with the ability of a member or unit of the National Guard to perform the military functions of the member or unit.

(ii) National Guard personnel will not degrade their military skills as a result of performing the activities.

(iii) The performance of the activities will not result in a significant increase in the cost of training.

(iv) In the case of drug interdiction and counter-drug activities performed by a unit organized to serve as a unit, the activities will support valid unit training requirements.

(3) A unit or member of the National Guard of a State may be used, pursuant to a State drug interdiction and counter-drug activities plan approved by the Secretary of Defense under this section, to provide services or other assistance (other than air transportation) to an organization eligible to receive services under section 508 of this title if--

(A) the State drug interdiction and counter-drug activities plan specifically recognizes the organization as being eligible to receive the services or assistance;

(B) in the case of services, the performance of the services meets the requirements of paragraphs (1) and (2) of subsection (a) of section 508 of this title; and

(C) the services or assistance is authorized under subsection (b) or (c) of such section or in the State drug interdiction and counter-drug activities plan.

(c) Plan requirements.--A State drug interdiction and counter-drug activities plan shall--

(1) specify how personnel of the National Guard of that State are to be used in drug interdiction and counter-drug activities;

(2) certify that those operations are to be conducted at a time when the personnel involved are not in Federal service;

(3) certify that participation by National Guard personnel in those operations is service in addition to training required under section 502 of this title;

(4) certify that any engineer-type activities (as defined by the Secretary of Defense) under the plan will be performed only by units and members of the National Guard;

(5) include a certification by the Attorney General of the State (or, in the case of a State with no position of Attorney General, a civilian official of the State equivalent to a State attorney general) that the use of the National Guard of the State for the activities proposed under the plan is authorized by, and is consistent with, State law; and

(6) certify that the Governor of the State or a civilian law enforcement official of the State designated by the Governor has determined that any activities included in the plan that are carried out in conjunction with Federal law enforcement agencies serve a State law enforcement purpose.

(d) Examination of plan.--(1) Before funds are provided to the Governor of a State under this section and before members of the National Guard of that State are ordered to full-time National Guard duty as authorized in subsection (b), the Secretary of Defense shall examine the adequacy of the plan submitted by the Governor under subsection (c). The plan as approved by the Secretary may provide for the use of personnel and equipment of the National Guard of that State to assist the Immigration and Naturalization Service in the transportation of aliens who have violated a Federal or State law prohibiting or regulating the possession, use, or distribution of a controlled substance.

(2) Except as provided in paragraph (3), the Secretary shall carry out paragraph (1) in consultation with the Director of National Drug Control Policy.

(3) Paragraph (2) shall not apply if--

(A) the Governor of a State submits a plan under subsection (c) that is substantially the same as a plan submitted for that State for a previous fiscal year; and

(B) pursuant to the plan submitted for a previous fiscal year, funds were provided to the State in accordance with subsection (a) or personnel of the National Guard of the

State were ordered to perform full-time National Guard duty in accordance with subsection (b).

(e) Exclusion from end-strength computation.--Members of the National Guard on active duty or full-time National Guard duty for the purposes of administering (or during fiscal year 1993 otherwise implementing) this section shall not be counted toward the annual end strength authorized for reserves on active duty in support of the reserve components of the armed forces or toward the strengths authorized in sections 12011 and 12012 of title 10.

(f) End strength limitation.--(1) Except as provided in paragraph (2), at the end of a fiscal year there may not be more than 4000 members of the National Guard--

(A) on full-time National Guard duty under section 502(f) of this title to perform drug interdiction or counter-drug activities pursuant to an order to duty for a period of more than 180 days; or

(B) on duty under State authority to perform drug interdiction or counter-drug activities pursuant to an order to duty for a period of more than 180 days with State pay and allowances being reimbursed with funds provided under subsection (a)(1).

(2) The Secretary of Defense may increase the end strength authorized under paragraph (1) by not more than 20 percent for any fiscal year if the Secretary determines that such an increase is necessary in the national security interests of the United States.

(g) Annual report.--The Secretary of Defense shall submit to Congress an annual report regarding assistance provided and activities carried out under this section during the preceding fiscal year. The report shall include the following:

(1) The number of members of the National Guard excluded under subsection (e) from the computation of end strengths.

(2) A description of the drug interdiction and counter-drug activities conducted under State drug interdiction and counter-drug activities plans referred to in subsection (c) with funds provided under this section.

(3) An accounting of the amount of funds provided to each State.

(4) A description of the effect on military training and readiness of using units and personnel of the National Guard to perform activities under the State drug interdiction and counter-drug activities plans.

(h) Statutory construction.--Nothing in this section shall be construed as a limitation on the authority of any unit of the National Guard of a State, when such unit is not in Federal service, to perform law enforcement functions authorized to be performed by the National Guard by the laws of the State concerned.

(i) Definitions.--For purposes of this section:

(1) The term "drug interdiction and counter-drug activities", with respect to the National Guard of a State,

means the use of National Guard personnel in drug interdiction and counter-drug law enforcement activities, including drug demand reduction activities, authorized by the law of the State and requested by the Governor of the State.

(2) The term "Governor of a State" means, in the case of the District of Columbia, the Commanding General of the National Guard of the District of Columbia.

(3) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

ALASKA STATUTES:

§ 26.05.060. Control of Alaska National Guard and Alaska Naval Militia

The governor as ex officio commander of the militia of the state has command of the Alaska National Guard and the Alaska Naval Militia while they are not in active federal service. The governor may adopt necessary regulations for them not inconsistent with 48 U.S.C. 473 - 479. Except as otherwise prescribed by those sections, the Alaska National Guard and the Alaska Naval Militia and their members are

subject to all federal laws and regulations relating to the National Guard and Naval Militia of the several states and territories and of the United States.

§26.05.070. Governor may order organized militia into active service

In the event of war, disaster, insurrection, rebellion, tumult, catastrophe, invasion, or riot; or if a mob or body of men act together by force with intent to commit a felony or to offer violence to persons or property, or by force and violence to break and resist the laws of the state, or the United States; or in the case of imminent danger of the occurrence of any of these events; or whenever responsible civil authorities fail to preserve law and order, or protect life and property, or the governor believes that failure is imminent, the governor may order the organized militia or any part of it, into active state service to execute the laws and to perform duties in connection with them that the governor considers proper. Whenever any portion of the militia is ordered into active service by the governor, it becomes an additional police force, retaining its separate entity and operating at all times as a military organization under military command, with power to cooperate with but not to supersede the existing civilian law enforcement officers whenever possible, for the re-establishment of law and order

and for the protection of life and property. The governor may also order members of the organized militia to active state service, with their consent, for the purpose of training or for full-time duty with the office of the adjutant general.